

LIBELED: On or about 2-6-62, W. Dist. Mo.

CHARGE: 402(a) (3)—contained insect larvae, insect excreta, and webbing while held for sale.

DISPOSITION: 3-28-62. Default—delivered to a public institution for use as animal feed.

28571. Dried fruits. (F.D.C. No. 46656. S. Nos. 57-925 R, 57-930/1 R.)

INFORMATION FILED: 12-20-61, S. Dist. Fla., against Natural Foods Co., Inc., Zephyrhills, Fla., and Alan I. Chenkin, director of maintenance and production, and Gilbert W. Chenkin, director of purchasing and sales.

SHIPPED: Between 2-28-61 and 3-19-61, from Florida to Georgia and South Carolina.

LABEL IN PART: (Top label) "Zephyr Brand Delicious Dried Fruits Distributed by Chenkins Natural Foods Company Zephyr Hills, Fla."; (bottom label) "Zephyr Brand 1 Pound Net FRUIT LOAF A Healthy Confection Ready to Eat [or "FRUIT COMPOTE 32-oz. Net"] Natural Foods Company, Inc. Zephyr Hills, Fla."

CHARGE: 402(a) (3)—contained whole insects, insect parts, and insect cast skins when shipped.

PLEA: Guilty.

DISPOSITION: 12-21-62. Corporation—\$300 fine; each individual—\$300 fine.

VEGETABLES AND VEGETABLE PRODUCTS

28572. Dried beans, rice, flour, sugar, cornmeal, lima beans, salt, bakery supplies, and animal and poultry feeds. (Inj. No. 364.)

COMPLAINT FOR INJUNCTION FILED: 3-8-60, N. Dist. Tex., against International Exterminator Corp., and Harlan K. Baker, president.

CHARGE: The complaint alleged that the defendants were engaged in the business of providing exterminator and pest-control services for establishments such as warehouses, mills, and dryers which store and sell articles such as dried beans, rice, flour, sugar, cornmeal, lima beans, salt, bakery supplies, and animal and poultry feeds; that the defendants' services were provided in Houston, Alvin, Brownwood, and elsewhere in Texas by agents working under contract with International Exterminator Corporation and under the supervision of Harlan K. Baker; that the defendants received a percentage of the monies received by such agents for the performance of such services; that in providing such services, the defendants caused quantities of a water solution of a poisonous rodenticide, sodium fluoroacetate, commonly known as Compound 1080, to be placed in and about buildings in Houston, Alvin, Brownwood, and elsewhere in Texas, under conditions whereby foods in such buildings may have become contaminated with this poison which has no known antidote.

It was alleged further that the defendants' agents prepared such water solutions of Compound 1080 from powdered Compound 1080 provided by the defendants; and that the act of causing water solutions of Compound 1080 to be placed in such buildings resulted in the foods being adulterated within the meaning of Section 402(a) (4) of the Act in that the foods were being held under insanitary conditions whereby they might have been rendered injurious to health; and that the insanitary conditions consisted of the placement of uncovered paper bait cups containing a water solution of Compound 1080 in and about such buildings and in close proximity to such foods.

It was alleged further that the defendants violated the Act by causing a water solution of Compound 1080 to be placed in and about such buildings, whereby the foods in such buildings may have been rendered injurious to health prior to being introduced or delivered for introduction into interstate commerce.

It was alleged further that the defendants also violated the Act by causing a water solution of Compound 1080 to be placed in and about such buildings while the foods in such buildings were being held for sale after shipment in interstate commerce, whereby the foods in such buildings may have been rendered injurious to health.

The complaint alleged also that the defendants had been warned, on several occasions, of the inherent dangers of using water solutions of Compound 1080 without proper precautions, and of the inherent dangers in the careless use of Compound 1080, and that the defendants had failed to correct their careless use of Compound 1080.

DISPOSITION: On 3-30-60, the defendants filed a motion to dismiss, alleging that the complaint failed to state a cause of action.

On 10-29-60, the court heard argument upon the motion and entered an order dismissing the complaint for injunction.

On 9-8-61, the United States Court of Appeals for the Fifth Circuit rendered the following opinion (294 F. 2d 270) :

JONES, Circuit Judge: "The United States brought suit against International Exterminator Corporation and Harlan K. Baker, its president, asserting violations of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. § 301 et seq., and praying for injunctive relief. The district court sustained a motion to dismiss on the ground that the complaint fails to state a cause of action upon which relief can be granted. The United States has appealed.

"The complaint which the district court held insufficient alleged that the defendants operate an exterminator and pest-control service for establishments such as warehouses, mills and dryers which store and sell foods such as beans, rice, flour, sugar, meal, salt, bakery supplies and also animal and poultry feed. In so doing, it is averred, the defendants are causing quantities of a poisonous liquid known as Compound 1080 to be placed in the establishments in uncovered paper bait cups in close proximity to the foods. This, the complaint alleged, results in the foods being adulterated within the meaning of the Act 'because of being held under insanitary conditions whereby they may have been rendered injurious to health prior to being introduced or delivered for introduction into interstate commerce.' Then the United States alleges that the acts of the defendants in placing the poisonous compound in the buildings violates the Act 'in that said acts are done while said foods in said buildings are being held for sale after shipment in interstate commerce and result in said foods being adulterated within the meaning of . . . the Act because of being held under insanitary conditions whereby they may have been rendered injurious to health.' The complaint charges that the defendants have been warned but fail to change their method of placing the poison.

"In a Rule 60(b)(1) motion for relief from the order of dismissal, the Government states that the dismissal was based on a finding that the language 'may have been rendered injurious to health' was insufficient and the correct test was the 'reasonable probability' that it would have been rendered injurious to health. It is this question to which the Government devotes its initial brief. In their brief the defendants assert that the complaint does not show the interstate character of the transactions so as to bring them under the Act. The defendants also assert that it is not shown by the complaint that the defendants committed any acts which are violative of the Federal Pure Food, Drug and Cosmetic Act.

"The complaint will be held sufficient if it shows that the plaintiff would be entitled to relief under any state of facts which could be proved in support of the claim alleged. *United States v. Goodman*, 5th Cir. 1961, 287 F. 2d 871;

Mitchell v. E-Z Way Towers, Inc., 5th Cir. 1959, 269 F. 2d 126; *Bruce Construction Corp. v. United States*, 5th Cir. 1957, 242 F. 2d 873.

"The defendants urged before the district court that the complaint failed to show that there was a reasonable probability that food would be rendered injurious to health. The Government contended that the test is whether there is a reasonable possibility that food would be rendered injurious to health. The authorities cited by the Government seem to sustain its position. *Golden Grain Macaroni Co. v. United States*, 9th Cir. 1953, 209 F. 2d 166; *Berger v. United States*, 8th Cir. 1952, 200 F. 2d 818. The defendants do not, on appeal, distinguish between probability and possibility of contamination, but instead assert that neither is alleged. Here the defendants rely upon the construction in *Berger v. United States, supra*, that the statutory phrase 'which may render such articles injurious to health' contemplates a condition which would, with reasonable possibility, result in contamination. The defendants say that the absence of an allegation that the defendants created a condition of reasonable possibility of contamination rendered the pleading bad and required dismissal. It is to be noted though that the rule announced in *Berger* is that the condition of reasonable possibility of contamination must be proved, not that it must be pleaded. *Berger* was a criminal case and it appears that the information used the statutory 'whereby they may have become contaminated' language. A motion attacking the sufficiency of the information as not stating facts sufficient to constitute an offense was overruled. The correctness of this ruling was not raised on appeal. We are here only concerned with the sufficiency of the pleading, and not with the scope and reach of the statute as applied to such facts as may be developed by pretrial procedures or by evidence adduced at a trial. The pleading was sufficient.

"There seems to us no question but that the complaint brings the case within the interstate commerce requirements of the Act. The statutory purpose 'was to safeguard the consumer by applying the Act to articles from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer.' *United States v. Sullivan*, 332 U.S. 689, 696, 69 S. Ct. 331, 92 L. Ed. 297. See *McDermott v. Wisconsin*, 228 U.S. 115, 33 S. Ct. 431, 57 L. Ed. 754, 47 L.R.A. N.S. 984.

"The motion to dismiss was erroneously granted. The order of dismissal will be reversed and the cause remanded for further proceedings."

On 11-9-61, written interrogatories were filed by the Government; and subsequently, the defendants answered 43 of the questions and objected to 4 of the 47 questions propounded by the interrogatories.

Trial of the matter took place on November 27, 28, and 29, 1961, before the court and a jury. On 1-3-62, the court signed the following judgment of permanent injunction:

BREWSTER, *District Judge*:

JUDGMENT OF PERMANENT INJUNCTION

"On this the 27th day of November, 1961, came on to be heard the above entitled and numbered cause and came the plaintiff, by and through the United States Attorney for the Northern District of Texas, and came the defendants, by their attorney, and both plaintiff and defendants having announced ready for trial, came a jury of twelve citizens, and both the plaintiff and defendants presented their evidence and after the close of such evidence and argument by counsel, and after the Court gave his charge to said jury, the jury retired to consider its verdict, following which the jury returned and delivered its verdict in open court, finding in favor of the plaintiff, and the Court finding said verdict proper in all respects and being of the opinion that judgment should be entered thereon.

"The nature of this proceeding being an action in equity and the verdict of the jury being only advisory to the Court, the Court thereupon having heard the evidence and argument of counsel is also of the opinion that judgment should be rendered for plaintiff.

"It is therefore ORDERED, ADJUDGED and DECREED as follows:

I.

"That the Court has jurisdiction of the subject matter herein and of all persons or parties hereto and the complaint states a cause of action against the defendants under the Federal Food, Drug, and Cosmetic Act.

II.

"That the defendants, International Exterminator Corporation, a corporation, and Harlan K. Baker, an individual, and each and all of their officers, agents, servants, employees, representatives, and all and any persons in active concert or participation with them or any of them who receive actual notice of this decree by personal service or otherwise, be and they are hereby perpetually enjoined and restrained under the provisions of 21 U.S.C. 332(a) from placing or causing to be placed in any building serviced by defendants any quantity of the rodenticide liquid Compound 1080 while such building is being used for the storage of foods held prior to shipment in interstate commerce and while held for sale after shipment in interstate commerce unless and until:

(1) The owner, manager or other person in active charge of the buildings serviced is informed that the rodenticide liquid Compound 1080 is being used, is advised of its highly toxic nature and that it must not be removed from the premises, and is further advised of the necessity for protecting stored foods from contamination by it;

(2) Liquid Compound 1080 is dispensed only in protected bait boxes (except as provided in (3) below) and said bait boxes are constructed so as to provide for the use of bait containers which cannot be overturned, or to provide a leak-proof receptacle for any liquid Compound 1080 which might be spilled or to provide for the blotting of liquid Compound 1080 which might be spilled;

(3) When work or other activity is not being carried on in said buildings, small quantities (approximately one-half ounce) of a liquid solution of liquid Compound 1080 may be used in open paper cups at floor level in said buildings, provided that such cups are firmly attached to the surface upon which they rest;

(4) Compound 1080 is prepared by the defendants and their officers, agents, servants, employees, representatives, and all persons in active concert or participation with them or any of them at their place of business and is colored with 0.5% Nigrosine black dye;

(5) Responsibility for control of Compound 1080 in use in such buildings is vested in one person of established reliability, and this person is fully informed as to the acceptable procedures for use of Compound 1080 and as to the potential hazards of careless use.

III.

"That the defendants, International Exterminator Corporation and Harlan K. Baker, shall give written notice of the provisions of this decree to each and all of their present and future officers, agents, servants, employees, representatives, and all persons now or in the future in active concert or participation with them or any of them who assist or participate in the performance of pest-control services.

"That the plaintiff, the United States of America, have and recover from the defendants all costs of this action, as taxed herein, and that the plaintiff have execution therefor."

Subsequently, the court made the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * * * *

"1. The defendant, International Exterminator Corporation is a corporation organized and existing under the laws of the State of Texas, and has its principal place of business at 155 Magnolia Street, Fort Worth, Texas, within the jurisdiction of this Court. The defendant, Harlan K. Baker, an individual, resides within the jurisdiction of this Court.

"2. The defendant, Harlan K. Baker, is president of the defendant International Exterminator Corporation; and is the person in charge of the opera-

tion of the business. He determines the business policies of the corporation.

"3. The defendants, International Exterminator Corporation and Harlan K. Baker, have been and are now engaged in the business of providing and causing to be provided exterminator and pest-control services to establishments, such as warehouses, mills, and dryers, throughout the State of Texas.

"4. Some of the establishments serviced by defendants store, sell and process foods such as dried beans, rice, flour, sugar, cornmeal, lima beans, salt, bakery supplies, and animal and poultry feeds, both prior to shipment of such foods in interstate commerce and subsequent to receipt of such foods in interstate commerce. Some of such establishments store and sell such foods after receipt of such foods in interstate commerce, but do not hold such foods prior to shipment in interstate commerce. Some of such establishments store, sell and process such foods prior to shipment in interstate commerce, but do not receive such foods in interstate commerce.

"5. The services of the defendants are provided to such establishments by agents of the defendants, working under contract with defendant, International Exterminator Corporation. Defendants receive a percentage of the monies received by such agents for the performance of such services.

"6. In providing the aforesaid exterminator and pest-control services to the said establishments, the said agents sometimes use a water solution of a poisonous rodenticide known as Compound 1080.

"7. The Court submitted this case to the jury on the following special issues:

SPECIAL ISSUE NO. 1: Do you find from a preponderance of the evidence that, unless prevented by court action from so doing, the defendant, International Exterminator Corporation, through its officers, agents or authorized representatives, will in reasonable probability in the future engage in the practice of using, or causing the use of, or participating in the use of, or of being responsible for the use of, Compound 1080 in establishments where at least some of the food which may be there located is being held for sale prior to or after shipment in interstate commerce, in such manner that the Compound may in reasonable possibility contaminate any of the food in such establishments?

The form of your answer will be either "YES" or "NO."

SPECIAL ISSUE NO. 2: Do you find from a preponderance of the evidence that, unless prevented by court action from so doing, the defendant, Harlan K. Baker, acting either by himself or through others, will in reasonable probability in the future engage in the practice of using, or causing the use of, or participating in the use of, or of being responsible for the use of, Compound 1080 in establishments where at least some of the food which may be there located is being held for sale prior to or after shipment in interstate commerce, in such manner that the Compound may in reasonable possibility contaminate any of the food in such establishments?

The form of your answer will be either "YES" or "NO."

"8. The jury answered each of said special issues "YES."

"9. The plaintiff and the defendants agreed to the submission of this cause to the jury on special issues; there were no objections to the issues as submitted.

"10. The findings of the jury in answer to said special issues are supported by a preponderance of the evidence.

"11. The Court adopts the findings of the jury and incorporates them as part of its own findings of fact.

CONCLUSIONS OF LAW

"1. This Court has jurisdiction of the parties and of the subject matter.

"2. The plaintiff is entitled to the relief granted by the judgment of this Court entered herein on January 3, 1962, to which judgment reference is here made under the provisions of 21 U.S.C. 332(a)."

28573. Dried Great Northern beans, dried pinto beans, and dried black-eyed beans. (F.D.C. No. 42750. S. Nos. 22-380/2 P.)

QUANTITY: 50 100-lb. bags of Great Northern beans; 1 100-lb. bag of pinto beans; and 8 100-lb. bags of black-eyed beans, at Kansas City, Kans., in possession of Nelson's Super Merchandise Mart.